Filed 2/11/19 In re S.U. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.U. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, D.U., et al., Defendants and Appellants.	E070916 (Super.Ct.No. RIJ118432) OPINION

APPEAL from the Superior Court of Riverside County. Walter H. Kubelun, Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant David U. (father).

Michelle D. Pena, under appointment by the Court of Appeal, for Defendant and Appellant Mandy B. (mother).

Gregory P. Priamos, County Counsel and James E. Brown, Guy B. Pittman and Prabhath Shettigar, Deputy County Counsel, for Plaintiff and Respondent.

Four children of mother, Mandie B., and fathers Damian W. and David U., were removed from parental custody and made dependents of the court after the Riverside County Department of Public Social Services (DPSS) intervened and initiated dependency proceedings for the third time. Because each of the parents had previously received family reunification services in prior proceedings, the juvenile court denied services at the disposition hearing in the third dependency proceeding pursuant to Welfare and Institutions Code[1] section 361.5, subdivision (b), and scheduled a selection and implementation hearing pursuant to section 366.26. Prior to that hearing, mother and father David U. made requests to modify the order denying reunification services, pursuant to section 388, which were denied. The court then terminated parental rights and mother and father David U. appealed.[2]

On appeal, father David U. argues that the juvenile court erred in denying his petition to modify where he demonstrated a substantial change of circumstances warranting additional reunification services. Mother argues that the court erroneously concluded that the exception to the termination of parental rights did not apply where she enjoyed a beneficial parent-child relationship with her children, and that if father's appeal

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Father Damian W. is not a party to this appeal.

results in a reversal as to him, the judgment terminating her parental rights needs to be reversed also. We affirm.

BACKGROUND

There are four children involved in this appeal: M.W. (born in 2008 to mother Mandy B. and father Damien W.)[3], S.U. (born in 2012 to mother and father David U.), and twins J.B. and C.B. (born in 2014 to mother and father David U.) Mother has two older children by a third father, Ba.W. and Br.W., who lived with their father during the earlier dependency proceedings. Ba.W. is now an adult, with whom all four of the younger children are placed.

Beginning in 2009, DPSS intervened on behalf of M.W. on grounds of neglect, based on mother's excessive drinking and bizarre behavior, as well as the fact that mother and maternal grandparents engaged in domestic violence in the presence of the children M.W., Ba.W. and Br.W., while Ba.W and Br.W were visiting mother. Mother had an extensive history with alcohol and domestic violence with father Damian W. A dependency petition was sustained as to M.W., but he was placed with his mother under a family maintenance plan, with reunification services provided to father Damian W.

The following year, a supplemental petition was filed pursuant to section 387, alleging that the prior disposition had been ineffective. The juvenile court sustained that petition, and denied reunification services to mother and father Damian W., setting a

[3] Damian W. is an enrolled member of the Choctaw Nation of Oklahoma, and, after the dependency was initiated, M.W. was also enrolled, so M.W. is an Indian Child subject to the Indian Child Welfare Act (ICWA).

section 366.26 hearing. However, on August 16, 2011, the court vacated that order, placed M.W. with mother for an extended visit, and reinstated maintenance services. In May 2012, mother was awarded sole custody of M.W., with supervised visits for father Damian W., and the following month, that dependency was terminated.

Between 2012 and 2013, unsubstantiated allegations involving stepfather David U. and M.W., brought mother to the attention of DPSS again. On March 13, 2013, allegations were made that mother had physically abused S.U, and that she was an alcoholic and drug user. In August 2014, a new dependency petition was filed on behalf of all four children, based on mother's drinking and drug use, as well as domestic violence involving David U.

A true finding was made on that petition on February 25, 2015, and reunification services were ordered. At the 18-month review stage, the children were returned to mother under a family maintenance plan. In July, a supplemental petition pursuant to section 387 was filed as to father David U., which was sustained on September 22, 2016, when the court awarded sole custody of all children to mother. By October 2016, the dependency proceedings as to all the children had been terminated.

In February 2017, Ba.W., mother's now adult daughter, picked up S.U., J.B. and C.B. following a fight between mother and father Damian W., with whom mother had resumed a relationship, in which furniture was broken. M.W. was living with his maternal grandparents, who were also alleged to use drugs, although that allegation was not substantiated. By this time, mother's oldest son, Br.W. was living with a cousin.

In September 2017, an allegation of general neglect was made against mother and father David U. Mother was using heroin and drinking vodka daily, father David U. was also using heroin, and both parents were engaged in domestic violence. Additionally, within the past month, the parents had been evicted from their residence. Ba.W., mother's adult daughter, filed a petition to establish a guardianship over the children on September 13, 2017, but that petition was denied because the probate court determined that juvenile court was the better forum. On September 29, 2017, father David U. texted the social worker to report mother had physically abused S.U., by throwing her against the wall.

On October 24, 2017, a hair follicle test performed on mother's hair showed the presence of amphetamine, methamphetamine, and heroin in mother's system. An audio recording indicated mother, father Damian W., and the maternal grandmother had discussed a type of shampoo that would interfere with hair follicle testing. The next day, the children were taken into protective custody. By this time, C.B. had a cast on his arm, which had been fractured.

On October 25, 2017, a new original petition was filed as to all four children, alleging neglect and failure to protect (§ 300, subd. (b)) and failure to provide (§ 300, subd. (g)) against mother and both fathers. Specifically, the petition alleged the unresolved substance abuse issues as to each parent, the history of domestic violence in the children's presence involving all parents, inappropriate discipline of S.U. by pulling

her arm, body slamming her and jerking her head, the lengthy child welfare histories of all parents and their respective criminal histories.

The petition also alleged that father David U. failed to provide the children with adequate food, clothing, or shelter and that he should have known of mother's substance abuse but failed to protect the children. On October 27, 2017, the petition was amended to allege mother failed to follow up with medical treatment for C.B.'s fractured arm, and added an allegation pursuant to section 300, subdivision (g) that father David U. was in rehabilitation and unavailable to provide care or support for his children.

The detention report outlined the incidents leading up to the new petition, and indicated that M.W. was an Indian child, but that ICWA did not apply to the other children. The report also indicated that mother was living in the home of a person whose sister is a social worker, so mother was getting inside information. At the detention hearing, the children were detained from the custody of all parents. Father Damian W. was found to the presumed father of M.W., who is an Indian Child, while father David U. was found to be the presumed father of S.U., J.B. and C.B. After notice was provided to the Choctaw Tribe, the tribe indicated its intention to intervene.

The jurisdiction report was filed on November 21, 2017, indicating that all the children had been placed with their adult sister, Ba.W. Summarizing the circumstances leading up to the current intervention, the report indicated that mother was living with father Damian W. and both were abusing drugs, while S.U., J.B. and C.B. were in their care. Mother has known Damian W. for 25 years and had had relationships with him

twice. M.W. had been living with the maternal grandparents, who had their own substance abuse issues: the maternal grandmother abused pills, while the maternal grandfather abused methamphetamine.

The report also outlined the many non-reunification issues, namely how mother failed to benefit from services for M.W. in the first dependency, and how she was again provided services in 2016 as to the younger three children, and how she continued to put the children's safety at risk. As a consequence, the social worker indicated that the services by-pass provisions of section 361.5, subdivision (b)(13), applied. The report recommended denying services to father Damian W. pursuant to section 361.5, subdivision (b)(10) because he was offered services in the 2009 dependency involving M.W., but failed to participate or even to maintain contact with his child. As for father David U., the social worker recommended no services under both subdivisions (b)(10) and (b)(13) of section 361.5, because he was offered services from 2015 to 2016 but failed to benefit as demonstrated by the subsequent sustaining of the supplemental petition in 2016 and his relapse into drug use.

On November 28, 2017, the Choctaw Tribe intervened on behalf of M.W. On that date, the matter came on calendar for the jurisdiction hearing, at which father Damian W. requested a contested hearing. The matter was set for the contest and the court authorized a medical procedure for C.B. that involved sedation. An addendum report filed in December 2017 indicated that all four children were doing well in the home of their adult

sister, and that the mother and father Damian W. had missed some drug tests. Father David U. was in a drug treatment program.

The addendum report also indicated that C.B. was receiving care for his broken arm, which might require surgery because mother had failed to ensure he received proper medical care. S.U. was undergoing dental care for ongoing dental problems that had been neglected by mother. The children's visits with the parents and relatives caused them to experience emotional trauma, because during recent visits the relatives created a scene in the children's presence. The social worker was concerned that the parents did not take responsibility for their actions, blaming the caretaker, mother's adult daughter Ba.W., for the children's removal and minimizing their drug use.

The next addendum report provided updated information on parental visits with the children, noting that M.W. chose not to participate in visits after about 10-15 minutes. Mother and father Damian W. had enrolled in services and were participating. However, neither mother nor Damian W. called or texted the children on Christmas. The caregiver (the adult sister of the children) reported that C.B. had an appointment regarding the removal of the pins in his fractured arm and that M.W. was scheduled for dental work to get spacers, but she was unable to inform mother of the appointments because mother's phone was apparently broken, so she did not get the message. The social worker continued her recommendation to deny services to all parents.

The contested jurisdiction hearing was set for January 23, 2018, at which time a second amended petition was filed. The second amended petition modified language

concerning domestic violence so that it alleged "domestic disputes," deleting three allegations entirely. The court made a true finding on the remaining allegations, and found all four children came within the provisions of section 300, subdivisions (b) and (g).

Prior to the disposition hearing, the social worker submitted an addendum report, still recommending denial of reunification services for all parents. Mother and Damian W. had visited the children and were appropriate. Mother and Damian W., however, had failed to show up for some drug tests, and canceled a visit. David U. visited the children on February 6, 2018; he was appropriate and engaged with the children. David U.'s drug tests were negative, and he interacted well during his visits.

The social worker's assessment revealed mother failed to benefit from her prior services and continued to abuse controlled substances. Her failure to follow up with proper care for C.B.'s fractured arm would require surgery to repair it. S.U. required ongoing dental care due to oral infections resulting from mother's neglect of the children's dental health. The children were happy and well cared for in the home of their adult sister, but they experienced trauma when they visited with mother and Damian W. Mother and Damian W. blamed the caretaker for the removal.

The social worker also expressed concern that David U. displayed behavior that put the children at risk, although he was compliant with the department in addressing the substance abuse issue and in visiting the children.

The contested disposition hearing took place on February 28, 2018. The court found by clear and convincing evidence that parental custody was likely to cause serious emotional or physical harm to the children and that active efforts had been made. The court removed custody of the children from all the parents and denied reunification services to mother pursuant to section 361.5, subdivision (b)(13), while denying services to Damian W. under section 361.5, subdivision (b)(10), and to David U. pursuant to section 361.5, subdivisions (b)(10) and (b)(13). The court set a hearing pursuant to section 366.3 to select and implement a permanent plan of adoption and limited the parents' education rights.

On the same date as the disposition hearing, mother filed a notice of intent to file a petition seeking extraordinary relief. However, the petition was subsequently withdrawn. DPSS filed its section 366.26 report, recommending termination of parental rights as to all four children. The report indicated that the Choctaw Tribe agreed that M.W. was living in an ICWA-compliant placement with his adult sister, and that all four children were adoptable. On June 18, an addendum report was filed with the preliminary adoption assessment, and again recommended adoption by the adult sister, with whom the children had a close attachment.

On June 20, 2018, David U. filed a request to modify the previous order pursuant to section 388 (JV-180), indicating he had completed several substance abuse programs and visited his children regularly, maintaining a strong parental bond. In response, the social worker indicated that although David U. had worked through several programs

between October 2017 and June 2018, the only program he had actually completed was in 2017, and he left the most recent program early, so his circumstances had not changed since February 2018, when services were denied. Additionally, the social worker observed father had not provided drug tests since April 2018, he had only recently obtained employment, and he was living on church property with no means to provide stability for the children.

On July 16, 2018, the court heard father's petition for modification, at which father submitted a negative hair follicle test result, as well as certificates of completion of substance abuse, anger management, parenting, and other programs.[4] At the hearing, David U. admitted he was not ready for the children.

Mother made an oral request to modify and also submitted certificates indicating her completion of a parenting program in 2015, and a domestic violence program in 2016. She admitted in testimony that she had relapsed in 2017, but described visits with the children during which they cling to her and do not want the visit to end. The court denied both petitions and proceeded with the selection and implementation hearing. As to each child, the court found that it would not be detrimental to terminate parental rights, and it severed the parent-child relationships of each parent.

Father appealed on July 16, 2018 and mother appealed the next day.

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[4] Mother made an oral request to modify and also submitted certificates indicating her completion of a parenting program in 2015, and a domestic violence program in 2016.

DISCUSSION

1. *Father's Appeal: Denial of the Petition for Modification*

Father argues the court abused its discretion in denying his modification petition because he made a sufficient showing to warrant relief in the form of additional reunification services. We disagree.

A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist, and (2) the proposed change would promote the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 316-317.) The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of the child. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529 (*Kimberly F.*).) "Generally, the petitioner must show by a preponderance of the evidence that the child's welfare requires the modification sought." (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.)

In evaluating whether the petitioner has met the burden to show changed circumstances, the trial court should consider: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*Kimberly F., supra*, 56 Cal.App.4th at p. 532.) The petition is addressed to the sound discretion of the juvenile court, and its decision

will not be overturned on appeal in the absence of a clear abuse of discretion. (*In re Stephanie M., supra,* 7 Cal.4th at p. 318; *In re S.J.* (2008) 167 Cal.App.4th 953, 959.)

Here, father has not established that his circumstances had materially changed. The record shows that the presenting problem was based on substance abuse and domestic violence, and that David U. has had the benefit of multiple programs, but has not completed a program since 2017. The social worker credited him with his compliance since the initiation of the third dependency, and noted he was engaged with the children during visits. However, his circumstances were not materially changed. First, it must be recalled that in the first dependency, he was granted services, but his drug relapse resulted in a sustained supplemental petition alleging the dispositional order had been ineffective. He has engaged in other programs in the interim, and completed a program in 2017, but while his recent hair follicle test was clean for drugs, he has not demonstrated he can maintain a clean and sober lifestyle for any extended period of time.

Additionally, while he argues that he has maintained a parental relationship with his children, he has not had custody of them since 2016, when the supplemental petition was filed due to his relapse, at which point mother was granted exclusive custody. Nor did he demonstrate modification of the prior order was in the children's best interests. He was only recently employed, and, at the time of the hearing, had been residing at Victory Outreach for three months, so he was unready to care for the children. While he was currently moving in the right direction to become rehabilitated, his circumstances were changing, rather than changed, and given his extensive history of drug use and domestic

violence, as well as history of relapses and the fact he had failed to reunify with his children in the prior dependency, the court acted within its discretion in denying the petition. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 49.)

Father is to be lauded for his attempts to rehabilitate himself, but to date he has not demonstrated the ability to maintain a stable, clean and sober lifestyle long enough to maintain employment or resume caring for his children. There was no abuse of discretion.[5]

2. *Mother's Appeal: The Court's Finding of No Exception to Adoptability Finding*

Mother argues the court erred in terminating her parental rights where she enjoyed a beneficial parent-child relationship with her children, such that severance of the relationship would be detrimental. We disagree.

"If the parents have failed to reunify and the court has found the child likely to be adopted, the burden shifts to the parents to show exceptional circumstances exist such that termination would be detrimental to the child." (*In re Grace P.* (2017) 8 Cal.App.5th 605, 611, citing *In re Autumn H.* (1994) 27 Cal.App.4th 567, 574; see also *In re L.S.* (2014) 230 Cal.App.4th 1183, 1199.) One such exceptional circumstance applies when the court finds a compelling reason for determining that termination would be detrimental to the child because the parents have maintained regular visitation and contact with the

[5] Father does not challenge the termination of parental rights.

child, and the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).)

"The first prong is quantitative and relatively straightforward, asking whether visitation occurred regularly and often." (*In re Grace P., supra*, 8 Cal.App.5th at p. 612.) "It is not an inquiry into the quality of visitation; this prong simply evaluates whether the parent consistently had contact with the child." (*Ibid., supra*, citing *In re I.R.* (2014) 226 Cal.App.4th 201, 212.) The second prong requires a parent to prove that the bond between the parent and child is sufficiently strong that the child would suffer detriment from its termination. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 450). In applying this exception, the court must take into account numerous variables, including but not limited to: (1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the "positive" or "negative" effect of interaction between parent and child, and (4) the child's unique needs. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 576.)

In *Autumn H., supra*, 27 Cal.App.4th 567, at page 575, the reviewing court held that the exception created by the predecessor to the current section 366.26, subdivision (c)(1)(B)(i) applied only when the relationship with a natural parent promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. It is now accepted that a strong and beneficial parent-child relationship might exist despite a lack of day-to-day contact and interaction. (*In re Casey D., supra,* 70 Cal.App.4th 38, 51.) In other words, it is unreasonable to require the parent of a child who has been removed from parental

custody to prove that the child has a "primary attachment" to the parent, or to show the parent and the child have maintained day-to-day contact. (*In re S.B.* (2008) 164 Cal.App.4th 289, 299.) As the court observed in *S.B.*, if that were the standard, the rule would swallow the exception. (*Ibid.*) Instead, the court determines whether the parent has maintained a parental relationship, or an emotionally significant relationship, with the child, through consistent contact and visitation. (*Id.*, at pp. 298, 300-301.)

Here, the record supports the fact that mother visited regularly and comported herself properly during those visits. However, the record also shows that during visits, the children experienced emotional trauma when visiting with mother and Damian W., as well as with the relatives. Additionally, during the course of this dependency, mother could not be reached because of a malfunctioning telephone when the caretaker wanted to inform her of medical or dental appointments for the children. Not staying in contact with DPSS or the caretaker or providing a reliable means of contact does not demonstrate commitment to the welfare of her children. In striking contrast to mother's argument about how attentive she is to her children's needs, she was not there for her children when they required dental care or medical care that involved sedation.

Thus, while mother may have met the technical requirements of section 366.26, subdivision (c)(1)(B)(i) by visiting regularly, the most important element remained out of her reach: that is, the bond was not so strong as to provide a compelling reason to determine that termination of the relationship would be detrimental to the child. (§ 366.26, subd. (c)(1)(B).) Further, as to M.W. who was the oldest and had been in

mother's custody the longest, he had spent several years living with his grandparents instead of mother prior to the third dependency, so we may assume mother did not occupy a parental role as to him. Further, his reluctance to participate in visits supports the trial court's findings that termination of parental rights would not be detrimental.

As to the other three children, they had been removed twice due to neglect and mother's substance abuse. Mother's neglect of her children's medical and dental needs does not appear to have been resolved. While she cares for the children at visits, the record does not show she had addressed the need to care for them on a daily basis and to meet their needs. Indeed, despite the certificates from the prior dependencies that she offered at the hearing, her neglect of the children's needs leading to the third removal, coupled with her failure to successfully address the causes of the dependencies, demonstrate that it would not be detrimental to terminate parental rights.

Instead, the children were happy in their placement, their needs were being met, and there is no indication they would suffer emotional harm if parental rights were terminated. Given mother's inability to get her act together after three dependencies supports the court's determination that severance of the relationship would not be detrimental. Bearing in mind that the benefit to the child must promote "the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents," mother has not met her burden. Her substance abuse is unresolved, she continues to engage in domestic violence even after

two prior dependencies addressed that issue, and she has not mastered the parenting skill to provide necessary medical care for her children.

Balancing the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer, adoption is in the children's best interests, and severing the natural parent/child relationship would not deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed. (See *In re L.S.* (2014) 230 Cal.App.4th 1183, 1199.)

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.